

July 17, 2013

Steven L. Flower
355 South Grand Avenue, 40th Floor
Los Angeles, CA 90071-3101

Re: Your Request for Informal Assistance
Our File No. I-13-089

Dear Mr. Flower:

This letter responds to your request for advice on behalf of Planning Commissioner Steven Sloan regarding the conflict-of-interest provisions of the Political Reform Act (the “Act”).¹ Because you have not identified any specific decision before the planning commission, we are treating your request as one for informal assistance.²

Please note that because the Fair Political Practices Commission (“the Commission”) does not act as a finder of fact when it renders assistance (*In re Oglesby* (1975) 1 FPPC Ops. 71), we base this letter on the facts presented.

QUESTIONS

Does Planning Commissioner Sloan have a disqualifying conflict of interest in the following decisions:

1. Decisions about the Old Town Seal Beach specific plan that affects properties within 500 feet of his residence?
2. Decisions about the Old Town Seal Beach specific plan that are within the specific plan area but farther than 500 feet from his residence?
3. Decisions about the Pacific Electric Right of Way specific plan that apply uniformly to the Right of Way?

¹ The Political Reform Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in Sections 18110 through 18997 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

² Informal assistance does not provide the requestor with the immunity provided by an opinion or formal written advice. (Section 83114; Regulation 18329(c)(3).)

4. Decisions about the Pacific Electric Right of Way specific plan that apply only to portions of the specific plan are more than 500 feet from his residence?

CONCLUSIONS

Mr. Sloan will have a conflict of interest that will prohibit him from participating in governmental decisions if the decision will have a reasonably foreseeable material financial effect on his real property interest. Without any information regarding the governmental decisions, we are unable to provide more than a general outline for your analysis.

FACTS³

You represent Steven Sloan, Planning Commissioner for District 1 in the City of Seal Beach. Mr. Sloan owns property in the Old Town area of Seal Beach, within 500 feet of the city's Main Street Specific Plan and the Electric Avenue Greenbelt ("the Greenbelt"), which runs along an abandoned Pacific Electric Right of Way. There are at least 500 other properties located within 500 feet of the Main Street Specific Plan Area ("specific plan area").

According to the 2010 census, Seal Beach has a population of 24,168. The city is divided into five electoral districts, each of which accounts for approximately one-fifth of the City's population. Each electoral district elects one resident to the City Council, and one resident from each electoral district is appointed by the City Council to the Planning Commission. Commissioner Sloan was appointed to represent District 1. District 1 includes the City's historic downtown area, which is commonly referred to as "Old Town." The focal point of Old Town is the City's traditional commercial core on Main Street, extending three blocks from Pacific Coast Highway to the Seal Beach Pier at the south-west end.

Development on Main Street is governed by the Main Street Specific Plan, which requires the Planning Commission's discretionary approvals for many types of land uses. The remainder of Old Town is almost entirely zoned for residential use, and the majority of residentially zoned properties are zoned for development at 20 dwelling units per acre. Consequently, Old Town is the most densely developed area of the City, with many residences located near commercial properties within the Main Street Specific Plan area.

The City previously adopted the Pacific Electric ROW Specific Plan to establish the use of the right-of-way with passive recreational uses. You stated that it is exceedingly unlikely that the City would ever allow any other uses on the Greenbelt, but the Planning Commission might be asked in the future to review and update the Pacific Electric ROW Specific Plan. The City's planning staff has not prepared a radius map for the Greenbelt, but it is estimated that the number of properties within 500 feet would be equal to or greater than the number of properties that are within 500 feet of the Main Street Specific Plan area.

³ We base these facts on your request for advice and acknowledge that Mr. Sloan also submitted a letter regarding this request.

ANALYSIS

Section 87100 prohibits any public official from making, participating in making, or using his or her official position to influence a governmental decision in which the official has a financial interest. A public official has a “financial interest” in a governmental decision, within the meaning of the Act, if it is reasonably foreseeable that the decision will have a material financial effect on one or more of the public official’s interests. (Section 87103; Regulation 18700(a).) The Commission has adopted an eight-step standard analysis for deciding whether an individual has a disqualifying conflict of interest in a given governmental decision.

You have explained that steps one and two of the analysis are met: Mr. Sloan is a public official and while there are no impending decisions currently, you anticipate there will be.

Step Three: What are Mr. Sloan’s interests?

The only interest about which you provided information is Mr. Sloan’s real property located in the Old Town area of Seal Beach. Under the Act, an interest in real property is an interest for purposes of the conflict-of-interest analysis if a public official has an interest of \$2,000 or more. We assume that this is the case for Mr. Sloan.

Step four: Will Mr. Sloan’s property be directly or indirectly involved in the governmental decisions?

Real property in which a public official has an interest is directly involved in a governmental decision if it is located within 500 feet of the boundaries of the property that is the subject of the governmental decision. (Regulation 18704.2(a)(1).) Mr. Sloan’s property is within 500 feet of the specific plan area and the Pacific Electric Right of Way area, though whether decisions before the planning commission will affect properties within 500 feet of his residence is unknown. For decisions that affect the entire specific plan areas, Mr. Sloan’s property is directly involved as they are deemed to affect properties within 500 feet of his properties.

If a public official’s interest is not directly involved in a governmental decision, it is indirectly involved. (Regulation 18704(a).) For decisions that affect a particular property (or properties) within either specific plan area and that are more than 500 feet from Mr. Sloan’s residence, his property is indirectly involved.

Step five: What is the applicable materiality standard?

Directly involved real property: Regulation 18705.2(a)(1) provides that the financial effect of a governmental decision on real property that is directly involved in the governmental decision is presumed to be material. This presumption may be rebutted by proof that it is not reasonably foreseeable that the governmental decision will have any financial effect, not even a “penny’s worth,” on the real property. This is known as the “one-penny rule.”

Indirectly involved real property: The financial effect of a governmental decision on indirectly involved real property is presumed not to be material. This presumption may be rebutted by proof that there are specific circumstances regarding the governmental decision, its financial effect, and the nature of the real property in which the public official has an interest that make it reasonably foreseeable that the decision will have a material financial effect on the real property in which the public official has an interest. (Regulation 18705.2(b)(1).)

Examples of these specific circumstances include, among other factors, development potential or use of the official's real property or the character of the neighborhood, including effects on traffic, view, privacy, intensity of use, noise levels, air emissions, or similar traits of the neighborhood. (Regulation 18705.1(b)(1)(A-C).) This provision recognizes that depending on the scope of the project, under certain circumstances, a material financial effect can occur beyond the 500-foot rule.

Step Six: Is it reasonably foreseeable that the financial effect of the governmental decision on Mr. Sloan's property will meet the applicable materiality standard?

Regulation 18706(a) provides:

For a material financial effect to be foreseeable on an official's interest, it need not be certain or even substantially likely that it will happen. The financial effect must, however, be more than a mere possibility. (Regulation 18706(a); *In re Thorner* (1975) 1 FPPC Ops. 198.)

Directly involved real property: For decisions in which your property is directly involved, it is reasonably foreseeable that there will be a material financial effect on your property.

Indirectly involved real property: we do not have sufficient information to determine whether the decisions will have a materially financial effect because you have not provided information on the decisions. This inquiring must be performed on a decision-by-decision basis.

Steps 7 and 8: Public Generally and Legally Required Participation.

Public Generally

The "public generally" exception allows an official to participate in a decision despite a conflict of interest if the effect of the decision on the official's interest is not distinguishable from the effect on the public generally. (Section 87103; Regulation 18707.) The exception would apply if the decision will affect a significant segment of the public in substantially the same manner as it would affect the public official's interests.

Regulation 18707(b) sets forth a four-step process to determine "if the effect of a decision is not distinguishable from the effect on the public generally."

"(1) Step One: Identify each specific person or real property (economic interest) that is materially affected by the governmental decision.

“(2) Step Two: For each person or real property identified in Step One, determine the applicable ‘significant segment’ rule according to the provisions of [Regulation 18707.1(b)].

“(3) Step Three: Determine if the significant segment is affected by the governmental decision as set forth in the applicable ‘significant segment’ rule. If the answer is ‘no,’ then the analysis ends because the first prong of a two-part test set forth in [Regulation 18707.1(b)] is not met, and the public official cannot participate in the governmental decision. If the answer is ‘yes,’ proceed to Step Four.

“(4) Step Four: Following the provisions of [Regulation 18707.1(b)(2)], determine if the person or real property identified in Step One is affected by the governmental decision in ‘substantially the same manner’ as other persons or real property in the applicable significant segment. If the answer is ‘yes’ as to each person or real property identified in Step One, then the effect of the decision is not distinguishable from the effect on the public generally and the public official may participate in the decision. If the answer is ‘no’ as to any person or real property identified in Step One, the public official may not participate in the governmental decision unless one of the special rules set forth in [Regulations 18707.2 through 18707.9] applies to each person or real property triggering the conflict of interest.” (Regulation 18707(b)(1)-(4).)

Without knowledge of the specific decisions Mr. Sloan will consider or the details related to his property, we cannot determine whether the public generally exception applies. We are including, for your information, Regulations 18707.1 and 18707.9. (Enclosed.) The test above and the enclosed information will help you in determining whether this exception applies.

Legally Required: You have not provided any facts that suggest this exception would apply.

If you have other questions on this matter, please contact me at (916) 322-5660.

Sincerely,

Zackery P. Morazzini
General Counsel

By: Heather M. Rowan
Senior Counsel, Legal Division

HMR:jgl

Enclosures